IN THE

SUPREME COURT OF THE UNITED STATES

OCT 8 19
MICHAEL RODAK, JR.

October Term, 1974

No. 74-393

JERRY D. BRANTLEY, et al.,

Petitioners,

-v.-

UNION BANK & TRUST COMPANY, et al.,

Respondents.

GRANT BAKER, CLINTON GRADY, ESSIE LEE FELTON, et al.,

Petitioners,

-v.-

R. FRANK KEEBLE, Individually, and TOWN FINANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	
I. Review by This Court Is Necessary to Settle Important Issues of Federal Law	9
II. The Decision of the Court of Appeals Fails to Apply Properly Existing Principles of State Action and Erroneously Establishes a Different Measure of State Action in Due Process Cases from That Employed in the Context of Equal Protection	13
III. Repossession Pursuant to the Alabama Statutory Scheme Denies Due Process Because There Is No Opportunity for a Hearing Prior to the Final Deprivation of Property	20

Page

Conclusion 21

Appendix

Court of Appeal's Opinion in *Brantley* and *Baker* 1a

Court of Appeal's Opinion in *James v. Pinnix* 4a

District Court's Order in *Baker* 17a

District Court's Order in *Brantley* 25a

Constitutional and Statutory Provisions 26a

Baker Complaint 40a

Brantley Complaint 46a

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3693 (1974) (No. 73-1842) 11, 12, 17, 18

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 13

Fuentes v. Shevin, 407 U.S. 67 (1972) 12, 21

Gonzales v. Automatic Employees Credit Union, 363 F.Supp. 143 (N.D. Ill. 1973), question of jurisdiction postponed to the hearing on the merits, ___ U.S. ___, 94 S.Ct. 1467 (1974) 12

Jackson v. Metropolitan Edison Company, 483 F.2d 754 (3rd Cir. 1973), cert. granted, ___ U.S. ___, 94 S.Ct. 1407 (1974) 12

James v. Pinnix, 495 F.2d 206 (5th Cir. 1974) 2, 9

Lathrop v. Donahue, 367 U.S. 830 (1961) 18

Marsh v. Alabama, 326 U.S. 502 (1946) 18

Page

McCabe v. Atchison, Topeka and Santa Fe R. Co., 235 U.S. 151 (1914) 15

Mitchell v. W. T. Grant Co., ___ U.S. ___, 40 L.Ed.2d 406 (1974) 12, 20, 21

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 15, 16, 17

Nixon v. Condon, 286 U.S. 73 (1932) 15

Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 18

Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956) 18

Reitman v. Mulkey, 387 U.S. 369 (1967) 15, 16, 17, 19

Shelley v. Kraemer, 334 U.S. 1 (1948) 14

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 21

United States v. Williams, 341 U.S. 97 (1958) 18

Page

CONSTITUTIONAL PROVISIONS:

U. S. Constitution, Amendment XIV, §1 . . . . . 3, 16

STATUTES:

Uniform Commercial Code, Section 1-105 . . . . . 4, 5

Uniform Commercial Code, Section 9-102 . . . . . 4, 5

Uniform Commercial Code, Section 9-302(1)(d) 4, 14

Uniform Commercial Code, Section 9-403 . . . . . 4, 14

Uniform Commercial Code, Section 9-503 . 4, 7, 8, 9, 10, 14, 16, 19

Uniform Commercial Code, Section 9-504 . . . . 4, 7, 8, 10, 14, 19

United States Code, Title 42, Section 1983 . . . . . 3, 8

OTHER AUTHORITIES:

Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S.Cal.L.Rev. 82 (1973) 10

Page

McCall, The Past as Prologue: A History of the Right to Repossess, 47 S.Cal.L.Rev. 58 (1973) 10

McCracken, Mao, & Fricke, Consumer Installment Credit and Public Policy (1965) 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Jerry D. Brantley, Grant Baker, Clinton Grady, Essie Lee Felton, et al., respectfully pray that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these cases on August 5, 1974.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, Nos. 73-3625, 73-3631 (5th Cir., August 5, 1974), is appended to this petition at 1a. The opinion in *James v. Pinnix*, reported at 495 F. 2d 206 (5th Cir. 1974), which the Court of Appeals held dispositive of the cases *sub judice*, is appended at 4a. The order of the United States District Court for the Middle District of Alabama in *Baker v. Keeble*, which is not reported, is appended at 17a. The order of the United States District Court for the Middle District of Alabama in *Brantley v. Union Bank & Trust Company*, which is not reported, is appended at 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1974. This petition for

certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the summary taking of petitioners' automobiles by respondents, authorized and encouraged by state law, constitutes state action within the Fourteenth Amendment and action under color of state law within 42 U.S.C. §1983.

II. Whether the Alabama statutory repossession scheme violates the due process clause of the Fourteenth Amendment by reason of its failure to provide a hearing prior to the final deprivation of property.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved in these cases are set forth in the Appendix beginning at 26a:

(1) U. S. Constitution, Amendment XIV, §1.

(2) Rev. Stat. Sec. 1979, 42 U.S.C. §1983.

(3) Code of Alabama 1940 (Recomp. 1958), Title 7a, §§1-105, 9-102, 9-302(1)(d), 9-403, 9-503, and 9-504.

STATEMENT OF THE CASE

In October of 1972, petitioner Grant Baker, a resident of Macon County, Alabama, obtained a loan of $2,100.00 from respondent Town Finance Corporation in West Point, Georgia, with which to purchase a 1970 Chevelle automobile.[1/] Since Mr. Baker was nineteen years old, petitioners Clinton Grady, a friend, and Essie Lee Felton, an aunt, executed the necessary papers, including a security agreement governed by Code of Alabama 1940 (Recomp. 1958), Title 7A, adopting the Uniform Commercial Code. The agreement gave Town Finance a security interest in

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1/ Since this case is here from a dismissal for failure to state a claim, the facts presented here are as alleged in the Complaint, the pertinent part of which is appended at 40a.

the Chevelle automobile and in all household possessions of petitioners Grady and Felton.[2] The $2,100.00 check was made payable to petitioner Grady and respondent Keeble, an agent of respondent Town Finance Corporation, who, with

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2/ The contract contained the following language:

> "Should the undersigned fail to pay any Obligation hereby secured on the interest thereon when the same becomes due, or default . . . the entire indebtedness hereby secured shall at the option of said Company or assigns become immediately due and payable without notice to the undersigned, and the Company or assigns shall then have the remedies of a secured party under the Uniform Commercial Code of Georgia (regardless of whether the Code has been enacted in the jurisdiction where rights or remedies are asserted), including without limitation thereto, the right to take possession of the Collateral . . . " (Emphases supplied.)

Although the provisions are identical anyway, the Code of Alabama and not Georgia governed because the collateral was located in Alabama (see §§1-105 and 9-102), a result foreseen by the parenthetical phrase in the contract.

petitioner Baker, thereupon drove to Phenix City, Alabama, where the Chevelle automobile was located.

After purchasing the Chevelle automobile, which was operated by young Mr. Baker, the petitioners fell behind one month in their payments due to illness. In February of 1973, respondent Town Finance repossessed the automobile by having it picked up by its agent at petitioners' home.

On April 11, 1972, petitioners Brantley purchased a 1970 Pontiac in Troy, Alabama, pursuant to a retail installment contract with the Union Bank in Montgomery.3/ The contract contained

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3/ Because the *Brantley* case was also dismissed for failure to state a claim, the facts presented here are as alleged in the Complaint, appended at 46a.

default and repossession provisions drafted in conformity with §§9-503 and 9-504.[4/]

After making 5 monthly payments, the Brantleys fell behind in October, 1972, when Mr. Brantley became ill. On December 7, 1972, at 6:30 a.m., a Union Bank agent came to the

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4/ The contract contained the following language:

> "In the event of a default hereunder, all unpaid installments and indebtedness secured hereby may, at the option of Seller and without demand or notice of any kind be declared, and thereupon immediately shall become due and payable and Seller may enter upon Buyer's premises to take possession of or request Buyer to make the Property available at some convenient place Seller designates to enable Seller to take possession or dispose of the Property and Seller may sell or otherwise dispose of the collateral or any part thereof and exercise from time to time any and all rights and remedies available to it under this agreement and any applicable law." (Emphasis supplied.)

Brantleys' home to take the car, representing to Mrs. Brantley, who was home alone, that his visit carried the sanction of the law. The Bank subsequently sold the automobile and instituted a civil suit to recover a $700.00 deficiency.

Baker and the Brantleys commenced separate suits in the United States District Court for the Middle District of Alabama challenging the constitutionality of §§9-503 and 9-504. Both suits are class actions brought under 42 U.S.C. §1983, invoking jurisdiction pursuant to 28 U.S.C. §1343(3)(4). A full explanatory order of dismissal for failure to state a claim was entered in *Baker* on August 9, 1973. The following day, *Brantley* was dismissed, on the basis of the court's opinion in *Baker*.

The Court of Appeals for the Fifth Circuit consolidated the *Baker* and *Brantley* cases on appeal in an order of January 18, 1974. The court postponed disposition of the appeal

pending its decision in *James v. Pinnix*, a challenge to the constitutionality of §9-503 arising out of the United States District Court for the Southern District of Mississippi. Subsequent to its decision in *James*, the court *sua sponte* placed *Baker* and *Brantley* on its Summary Calendar. On August 5, 1974, the Court of Appeals summarily affirmed the District Court's ruling on the basis of the former's opinion in *James* that the "statutes [were] free from Federal due process scrutiny for lack of requisite state action." (App. p. 3a.)

REASONS FOR GRANTING THE WRIT

I.

REVIEW BY THIS COURT IS NECESSARY TO SETTLE IMPORTANT ISSUES OF FEDERAL LAW.

The Alabama repossession statutes challenged by petitioners are substantially identical to those enacted in virtually every

state.[5/] Their disproportionate effect on the poor,[6/] coupled with the growing concern over consumer rights generally, have spawned attacks

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5/ McCall, The Past as Prologue: A History of the Right to Repossess, 47 S.Cal. L.Rev. 58, 75 (1973).

6/ One study of repossession ratios of new car credit buyers, categorized by occupation, showed that the repossession ratio of unskilled workers was about seven times that of professional and semi-professional employees. McCracken, Mao, & Fricke, Consumer Installment Credit and Public Policy 129 (1965). While theoretically §§9-503 and 9-504 are available to creditors in all their secured transactions, in practice they are employed most frequently against poor buyers, while problems with more affluent buyers are 'worked out.' As one commentator has noted, "Most credit granters attempt to segregate those accounts that represent a high risk and a low probability of success in obtaining a response from form letters. These accounts are then moved quickly up the scale of intensity of collection effort . . . . Some firms immediately assign some of those accounts to a field representative rather than risk delay in ultimate collection." Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S.Cal.L.Rev. 82, 87 (1973).

on their constitutional validity across the nation.7/

The resulting decisions generally have not considered the due process issue because the courts have found no state action. In so doing, the courts have failed to apply properly existing principles of state action. Several, most notably the Circuit Court below, have concluded that the definition of state action in the context of alleged due process violations is different from the definition of state action in conjunction with the equal protection clause. Since this court has never articulated such a 'double standard,' and since the employment of same has far-reaching implications in a wide range of cases, it is imperative that this

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7/ *See* Petitioners' Brief for Certiorari at 8-9, Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3693 (1974) (No. 73-1842).

Court provide the definitive analysis which the lower courts clearly are seeking.[8/]

In addition, by addressing the due process issue raised by these cases, this Court will have an opportunity to further clarify its decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972), in light of its holding in *Mitchell v. W. T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406 (1974).

8/ Gonzales v. Automatic Employees Credit Union, 363 F.Supp. 143 (N.D. Ill. 1973), question of jurisdiction postponed to the hearing on the merits, ___ U.S. ___, 94 S.Ct. 1467 (1974), does not present the state action issue clearly because appellants' challenge to Illinois' repossession statutes involves complicated procedural questions. *Adams v. Southern California First National Bank*, *supra*, challenging California's repossession statutes, does not squarely address the apparent double standard aspect of the state action question. Jackson v. Metropolitan Edison Company, 483 F.2d 754 (3rd Cir. 1973), cert. granted, U.S. ___, 94 S.Ct. 1407 (1974), deals with state action and due process issues in the context of a publicly regulated utility company's extrajudicial termination of a customer's electrical service. The Court may wish, however, to consolidate the latter two cases with the instant cases.

II.

THE DECISION OF THE COURT OF APPEALS FAILS TO APPLY PROPERLY EXISTING PRINCIPLES OF STATE ACTION AND ERRONEOUSLY ESTABLISHES A DIFFERENT MEASURE OF STATE ACTION IN DUE PROCESS CASES FROM THAT EMPLOYED IN THE CONTEXT OF EQUAL PROTECTION.

We start with the oft-stated principle that "private conduct abridging individual rights does no violation to the [due process clause] unless to some significant extent the State in any of its manifestations has been found to become involved in it." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). This does not mean that ostensibly private conduct is protected from scrutiny. To the contrary, the Court always has adhered to the principle that "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Supra* at 722.

The "facts and circumstances" in the instant cases reveal the following:

1. Through legislative action Alabama authorizes secured creditors to unilaterally determine default and repossess collateral "without judicial process." §9-503.

2. Secured creditors rely on this authorization in writing in the contracts they present to debtors and orally at the time default occurs.

3. The State controls the means through which a creditor protects his security interest. This is accomplished by filing a financing statement with an officer of the State, for which the State receives a fee. §§9-302(1)(d) and 9-403.

4. The statutory scheme authorizes deficiency judgments as an integral part of repossession. §9-504.

See Shelley v. Kraemer, 334 U.S. 1 (1948).

In *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967), this Court agreed with the lower court's reasoning that "a prohibited state involvement could be found even where the state can be charged with only encouraging, rather than commanding discrimination." This 'encouragement theory' of state action also has been employed in *McCabe v. Atchison, Topeka and Santa Fe R. Co.*, 235 U.S. 151 (1914); *Nixon v. Condon*, 286 U.S. 73 (1932); and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).9/

9/ *Reitman v. Mulkey, supra,* dealt with a state constitutional amendment which forbade the state from interfering in the private sale or rental of residential property. In *McCabe, supra,* the Court was faced with a statute authorizing railroad cars for whites and not blacks. While the case was dismissed on procedural grounds, the Court made it clear that the statute was invalid because the carrier would be "acting in the matter under the authority of state law." (At 162.) Citing the case in *Reitman,* Justice White said, "This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action . . . ." (At 379.) *Nixon, supra,* involved a statute which empowered the executive committee of a political party to prescribe the qualifications

The only important distinction between these cases and the cases *sub judice* is that the latter are not race discrimination cases.10/

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of its members but contained no directive. The Court in *Reitman* said:

"Reposing this power in the executive committee was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association; the exercise of the power was viewed as an expression of state authority contrary to the Fourteenth Amendment." (At 379.) In *Moose Lodge, supra,* the Court found state action where a liquor board regulation gave effect to private clubs' racially discriminatory by-laws.

10/ The fact that the statute in *Reitman* allowed what was formerly prohibited, while the right to repossess was recognized at state common law was rejected by the Circuit Court as a meaningful distinction. (App. 14a.) That court also found that the argument that the right flows from the contract does not add to the analysis (*Id.* at 15a.) It should be pointed out, however, that §9-503 allows self-help repossession even when the contract is silent on the point. Therefore, it has altered state common law, and the contract is not the sole source of summary repossession power. Petitioners concede, however, that if the challenged statutes are declared unconstitutional, the right of repossession would still exist under contract. This considerably weakens the contention that a constitutional rule would hamper the credit industry.

In fact, the court below concluded: "Some state involvement in the *Reitman-Moose Lodge* sense may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action." (App. 15a.) (Emphasis supplied.) Similarly, the court in *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3693, (1974) (No. 73-1842), said, in discussing *Reitman*, "[W]e are not convinced that the resolution of the state action question involving prejudgment self-help repossession of secured property is controlled by a case involving racial discrimination." (At 333.)

The suggestion that non-race cases are subjected to a stricter state action test is not supported by the decisions of this

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Petitioners' objective is not to guarantee against injustices but to remove Government's thumb from the scales.

Court.[11/] The Court in *Adams*, presumably in recognition of this fact, attempts to justify its conclusion by saying:

> Although it may be argued that state action is a "jurisdictional" question to be considered separate from substantive matters, the test of balancing facts and weighing circumstances seems to require consideration of the substantive facts. This should not result in a hierachy of rights, or different state action tests for due process and equal protection, but rather should permit independent factual determinations of state action on a case-by-case approach. (n. 23 at 333.) (Emphasis supplied.)

In fact, the result in these cases has been precisely what the *Adams* Court disavows: different state action tests for due process and equal protection. In the instant cases,

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11/ *See Public Utilities Comm'n. v. Pollak*, 343 U.S. 451 (1952); *United States v. Williams*, 341 U.S. 97 (1958); *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956); *Lathrop v. Donahue*, 367 U.S. 830 (1961), and *Marsh v. Alabama*, 326 U.S. 502 (1946).

the State of Alabama has, by enacting §§9-503 and 9-504, manifestly encouraged summary repossession. The specific reference to the UCC in the *Baker* contract and to "rights and remedies available to it under . . . applicable law" in the *Brantley* contract are ample evidence that in drawing up the agreements respondents were persuaded to include summary repossession by the fact that Alabama statutes so permitted. Further evidence is found in the agent's representation to Mrs. Brantley that his imminent act of repossession carried the sanction of law. The State has further involved itself by setting up a filing system by which to protect the creditor's security interest. These are the "independent factual determinations" that have to be made, and they clearly indicate that, under *Reitman* and its line of cases, the state has sufficiently involved itself to raise a federal question. To hold otherwise is to establish a questionable rule that a federal court,

while opening its doors to alleged violations of equal protection, may close them with respect to due process claims.

III.

REPOSSESSION PURSUANT TO THE ALABAMA STATUTORY SCHEME DENIES DUE PROCESS BECAUSE THERE IS NO OPPORTUNITY FOR A HEARING PRIOR TO THE FINAL DEPRIVATION OF PROPERTY.

The Alabama statutory scheme challenged herein allows the creditor to repossess and dispose of the debtor's property without any opportunity for a hearing. This is a far cry from the "constitutional accommodation of the respective interests of buyer and seller" which the Court found characterized the Louisiana sequestration procedure upheld in *Mitchell v. W. T. Grant Co.*, ___ U.S. ___, 40 L.Ed2d 406, 415 (1974). To the contrary, the challenged statutes unconstitutionally ignore the interests of the buyer in favor of the seller.

The Court in *Mitchell*, referring to "a long line of cases in this Court, culminating in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972)," said: "[T]hey stand for the proposition that a hearing must be had before one is finally deprived of his property . . . ." (At 415-6.)

Petitioners having been finally deprived of their property without an opportunity to be heard clearly were denied due process.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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